

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 588 of 1994

with

CRIMINAL APPEAL No 767 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

and

Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

BHIKHUBHAI MOHANBHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 588 of 1994
MR YN RAVANI for Appellant No. 1
MR AJ DESAI, APP, for Respondent No. 1
 2. Criminal Appeal No. 767 of 1994
MR AJ DESAI, APP, for Appellant No. 1
NOTICE SERVED for Respondent No. 1
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CORAM : MR.JUSTICE A.L.DAVE
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 13/05/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

These appeals arise out of a judgment and order rendered by the Additional Sessions Judge, Amreli on April 18, 1994 in Sessions Case No.97 of 1992 before him recording conviction of appellant in Criminal Appeal No.588 of 1994 for an offence punishable under Section 302 of IPC sentencing him to undergo imprisonment for life and to pay a fine of Rs.500/-, in default, to undergo SI for six months, and acquitting the respondents in Criminal Appeal No.767 of 1994 for the offences punishable under Section 302 read with 114 of IPC and Section 506(2) of IPC.

2. The facts of the case can be stated thus:-

Sarambhada is a village located in Amreli taluka of Amreli district. The fields of deceased Popatbhai Devjibhai and respondent No.1 in Criminal Appeal No.767 of 1994 Mohanbhai Polabhai are situated adjacent to each other in the outskirts of village Sarambhada. A long drawn dispute between the two was going on in respect of the boundaries which is customarily maintained by making a low rising earthen wall or a earthen divider. On May 11, 1992 at about 10.00 A.M. deceased Popatbhai Devjibhai and his wife Bhanuben were unloading fertilizer from their bullock cart in their field. They noticed that appellant-Bhikhubhai and respondent-Mohanbhai Polabhai and Fulbaiben wife of Mohan Pola were digging the earthen boundary from the side of the field of Popatbhai Devjibhai. He, therefore, asked them not to do so. Somehow appellant-Bhikhubhai insisted on continuing with the digging and there was an altercation. In this, Mohanbhai Polabhai and Fulbaiben caught hold of deceased Popatbhai and dragged him to an adjoining canal (rain water drain) and at that time appellant-Bhikhubhai Mohanbhai who had a pick axe in his hand inflicted a blow of the pick axe on head of Popatbhai, as a result, Popatbhai fell down. Parallel to this, on hearing the altercation Arvindbhai, nephew of Popatbhai, who was working in his nearby field, came down rushing and saw the incident. On Bhikhubhai inflicting blow on head of deceased Popatbhai and Popatbhai falling down, Arvindbhai and Bhanuben raised shouts. All the three assailants,

therefore, fled away immediately. On hearing shouts of Arvindbhai and Bhanuben, Dhiru Kanji and Bachubhai Hadabhai came to the spot. Dhirubhai lifted deceased Popatbhai from the canal. Simultaneously, Bachubhai brought the bullock cart and the deceased was placed in the bullock cart, taken to the village and thereafter to the hospital at Amreli where he was declared dead. A complaint was lodged by Arvindbhai on the basis of which offence was registered and investigation started. At the conclusion of investigation, the investigating agency found that there was evidence against Bhikhubhai Mohanbhai, Mohan Pola and Fulbaiben wife of Mohan Pola and, therefore, chargesheeted them for the offence punishable under Sections 302, 447, 506(2) and 114 of IPC before Chief Judicial Magistrate, Amreli. Since the case was triable exclusively by a Court of Sessions, it was committed to the Court of Sessions by learned Chief Judicial Magistrate and Sessions Case No.97 of 1992 came to be registered.

2.1 Charge was framed against all the three accused persons at Exh.1 for the offences punishable under Section 447 read with Section 34, Section 302 read with Section 34. In the alternative, Section 302 read with Section 114 of IPC and in the alternative Section 302 against accused No.1 only and for offence punishable under Section 506(2) of IPC read with Section 34 of IPC. The accused persons pleaded not guilty to the charge and came to be tried. Considering the evidence led by the prosecution, learned Additional Sessions Judge came to a conclusion that charges against accused Nos.2 and 3 Mohan Pola and Fulbaiben wife of Mohan Pola were not established by the prosecution. However, he came to a positive conclusion that charge of murder against accused Bhikhubhai Mohan was established and he, therefore, recorded conviction and sentenced him to imprisonment for life, as stated above. The learned Additional Sessions Judge acquitted accused Mohan Pola and Fulbaiben of the charges levelled against them.

2.2 Aggrieved by the said order of conviction, accused Bhikhubhai Mohanbhai Patel has preferred Criminal Appeal No.588 of 1994 whereas the State, being aggrieved by acquittal recorded in respect of accused Mohan Pola and Fulbaiben wife of Mohan Pola has preferred Criminal Appeal No.767 of 1994. As both appeals arise out of same judgment, they are heard together and are disposed of by this common judgment.

2.3 For sake of convenience, the appellant in Criminal Appeal No.588 of 1994 is addressed to as accused

No.1 and respondents No.1 and 2 in Criminal Appeal No.767 of 1994 are addressed to as accused Nos.2 and 3 respectively in this judgment.

3. Accused No.1 was arrested by the Investigating Officer on 13th May, 1992 and has been in custody since then. While admitting appeal preferred by the State, bailable warrant in sum of Rs.2000/- came to be issued against each of the respondent/ accused No.2 and 3 by order dated November 30, 1994. Accused Nos. 2 and 3 have chosen not to contest this appeal. However, accused No.1 is represented by learned advocate Mr Ravani who has voluntarily assisted this Court in considering the case against accused Nos.2 and 3 as well. The State is represented by learned APP Mr Desai.

4. We have heard learned advocate Mr Ravani and learned APP Mr Desai on merits of their respective appeals. We have been taken through the record and proceedings of the case by them. We have given it a close scrutiny.

5. Learned advocate Mr Ravani submitted that the case of prosecution suffers from a large number of lacunae. He submitted that although Bhanuben and Arvind claimed to be eye witnesses, the possibility of they having not witnessed the incident cannot be ruled out. He submitted that Bhanuben claims to be with the deceased at the time of the incident but makes no attempt to intervene in the incident or to pacify the parties. Admittedly, Bhanuben and the deceased were unloading the fertilizer from the bullock cart, which was at a distance of about 100 to 150 ft. from the boundary. The incident has occurred in the canal beyond the boundary. It has come in evidence that the boundary i.e. earthen wall or divider is of a height of about 3 to 4 ft.. It has also come in evidence that the depth of canal is about 3 to 4 ft.. It has come in evidence that on the earthen boundary, there is plantation of babul tree and kedki. Mr Ravani, therefore, submitted that Bhanuben could not have seen the actual occurrence of deceased being given blow on the head and possibility of somebody else having caused the injury to the deceased cannot be ruled out.

5.1 Mr Ravani submitted that likewise field in which Arvind was working is located at a long distance. There is a road in between the two fields with rain water drain on both the sides of the road and, therefore, neither Arvind could have heard the quarrel nor could he have immediately rushed to the spot, as he claims to have done. He could not have seen the incident himself. Mr

Ravani, therefore, submitted that depositions of witnesses Arvindbhai and Bhanuben deserve to be discarded as eye witnesses. They have concocted the story to square up the account with the accused persons for the long drawn dispute on the question of boundary.

5.2 Mr Ravani submitted that when the deceased was taken to the hospital and the Doctor had sent a yadi to the police and that yadi ought to have been treated by the trial Court as the FIR rather than the complaint by Arvindbhai as the FIR. He submitted that the yadi contains reasonable details about the incident and, therefore, it ought to have been treated as the FIR. If that is done, FIR does not reveal the names of the assailants. The complaint is an after thought and contains name of the accused persons, which aspect has not been properly considered by the trial Court.

5.3 Mr Ravani submitted that the medical evidence and the version given by the eye witnesses run contrary to each other. The nature of injury as emerging from the medical evidence is inconsistent with the evidence of all the eye witnesses. The doctor has described the dimension of the injury as 2 cms. X 12 cms. X 1 cm., which would mean that the length of injury was 2 cms. width was 12 cms. and depth was 1 cm.. The weapon alleged to have been used is a pick axe which could not have caused this type of injury. The doctor has, therefore, changed his version in his deposition to suit to the evidence of the eye witnesses.

5.4 Mr Ravani has drawn the attention of this Court to certain contradictions emerging from the evidence led by the prosecution. He submitted that according to Bhanuben, Arvind told regarding the incident to witness Hasmukh whereas witness Hasmukh has deposed that he was informed about the incident by Bhanuben. Likewise, witness Dhuru Kanji has come out for the first time before the Court to say that he intervened by saying, "Dodo dodo shu kam karo chho". This version is not emerging in his statement before the police.

5.5 Mr Ravani submitted that presence of witness Dhuru Kanji is also doubtful although he claims to have reached the place of incident soon after the incident. Mr Ravani submitted that according to this witness, he had picked up the deceased from the canal single handed and brought him out of the canal and put him on the bullock cart. It has come in evidence that the deceased had a very serious type of injury on his head and that he was bleeding at that point of time. In spite of this, it

is the case of the prosecution that Dhiru's clothes were not stained with blood. According to Mr Ravani, this is an impossibility and presence of this witness, therefore, becomes doubtful. Mr Ravani submitted that even cloth of Bhanuben was blood stained. That cloth has also not been recovered by the police and an explanation is sought to be given by Bhanuben that the blood stained cloth was washed after the incident.

5.6 The prosecution has relied on the discovery of weapon and a panchnama to that effect has been drawn. Mr Ravani submitted that it is not a discovery nor it is a recovery because it is produced by accused No.3. The condition of the weapon, particularly, the nature of blood stain makes it a doubtful weapon.

5.7 Mr Ravani submitted that the medical evidence suffers from various discrepancies. First is regarding the dimensions of the injury. Second is absence of any foreign particle in the injury and third is that the Doctor has not given due inspection to the injury. There is absence of injury that would be caused while removing the weapon from the body.

5.8 Mr Ravani submitted that all these factors taken collectively would render the prosecution story untrustworthy and doubtful. The trial Court has ignored all these aspects and has recorded conviction of accused No.1. His appeal, therefore, may be accepted by this Court.

5.9 Mr Ravani has made an alternative argument that admittedly there were long drawn disputes between the parties. The quarrel took place suddenly and only one blow is given with pick axe by accused No.1, which is an agricultural implement which was in his hand at the time of the incident. Therefore, the case cannot fall within the definition of "murder". At the most, it would be a case of "culpable homicide not amounting to murder". Mr Ravani submitted that accused No.1 has been in jail since 13th May, 1992, which is exactly 11 years from today. He relied on several decisions of this Court as well as the Apex Court in support of his argument that where an incident occurs suddenly; where only one injury is caused and where the incident has occurred because of loss of self-control, the case would fall within the definition of culpable homicide not amounting to murder and appropriately the punishment may be reduced. He submitted that the conviction may be altered to conviction under Section 304 Part II of IPC.

5.10 As regards Criminal Appeal No.767 of 1994 learned advocate Mr Ravani submitted that there is no evidence to indicate that there was any conspiracy amongst the accused persons nor is there any evidence to indicate that accused Nos.2 and 3 had any intention of aiding or abetting the criminal act of accused No.1 at the time of the incident. He submitted that the incident occurred suddenly and that accused Nos.2 and 3 could not have known or anticipated such an incident. He, therefore, submitted that the trial Court has rightly recorded acquittal in respect of accused Nos.2 and 3 and the said appeal may be dismissed.

6. Learned APP Mr Desai has opposed the conviction appeal vehemently. He has drawn attention of this Court to the evidence on record, particularly, the map to indicate that witness Arvind's field is not very far off. It is across the road and the distance, if considered, would be hardly 50 to 60 ft.. Therefore, he could have definitely heard the altercation, more so, when it has come in evidence that he was working in his field near the boundary of the field adjacent to the road. He submitted that for a villager cross country run of 50 to 60 ft. is not a difficult or time consuming affair and, therefore, he could have definitely run and witnessed the incident as he claims to have done. There is no reason to doubt his evidence.

6.1 Mr Desai submitted that apart from Arvind there is deposition of Bhanuben. The evidence on topography of the place of incident is clear enough to indicate that Bhanuben was standing on the earthen wall. The depth of the canal is hardly 24 to 30 inches. The plantation of Kedki and or Babul had not grown so tall as would

obstruct the vision and, therefore, Bhanuben's deposition itself is sufficient to bring home the charge against accused No.1. Mr Desai submitted that Arvind's deposition is only an additional piece of evidence.

6.2 Mr Desai submitted that evidence of Dhiru need not be doubted only on account of lack of blood stains on his clothes. There is no evidence on record which would indicate that the deceased was bleeding profusely. Further, there is no evidence and there is no cross-examination on aspect of how the deceased was lifted by Dhiru. The position would matter in such eventualities. Mr Desai submitted that Dhiru's evidence is only hearsay evidence so far as the incident is concerned. It hardly affects the evidence of the two eye witnesses on the basis of which conviction is recorded by

the trial Court. Mr Desai, therefore, submitted that the appeal of accused No.1 may be dismissed.

6.3 On the aspect of alternative submission made by Mr Ravani, Mr Desai submitted that single injury by itself cannot take the case out of the purview of murder. The evidence indicates that there was not much of quarrel or altercation or not much heat was generated. Simply because the deceased asked the accused persons not to dig his field, the blow was given. There is nothing on record to indicate that something had transpired which would suddenly and gravely provoke accused No.1. Besides this, the nature of weapon used, the site of injury and the force with which the blow was given would all go to indicate that the injury was caused with a clear intention of causing death of the deceased. Mr Desai submitted that there cannot be any dispute about the principle that where there is a sudden quarrel without premeditation and if a single injury is caused in heat of passion, the case may fall within the purview of culpable homicide not amounting to murder. But, in the instant case, Mr Desai submitted, that the evidence indicates that there was no provocation, no quarrel and there is nothing to indicate that there was loss of self-control. Mr Desai, therefore, submitted that the alternative submission made by Mr Ravani may not be accepted.

6.4 As regards State's appeal, Mr Desai submitted that accused Nos.2 and 3 dragged the deceased to the canal and that accused Nos.2 and 3 holding the deceased, possibly accused No.1 could not have caused the injury. The deceased could have possibly defended himself and, therefore, accused Nos.2 and 3 ought to have been convicted for offence punishable under Section 302 read with 114 of IPC, if not for Section 302 read with 34 of IPC. He, therefore, urged that Criminal Appeal No.767 of 1994 may be allowed.

7. We have gone through the record and proceedings and the evidence on record. As has rightly been submitted by the learned advocates, the material evidence is that of PW 1 Arvindkumar Rambhai at Exh.10 and the evidence of Bhanuben PW 3 at Exh.17. These two are eye witnesses and, therefore, their deposition will assume importance for considering whether the conviction is rightly recorded or not.

8. Witness Arvindkumar Rambhai Exh.10 happens to be nephew of deceased Popatbhai. He says that their field is located right across the road to the field of

Popatbhai. He knows the accused persons. He says that on the day of incident i.e. on May 11, 1992 he had gone to his field. Deceased Popatbhai and witness Bhanuben were in their field. They were bringing fertilizer to the field. The incident occurred at about 10.00 AM. He heard an altercation in the field of his uncle Popatbhai. He saw that the accused persons were quarreling with the deceased. He, therefore, went there. The accused persons were digging the earthen wall (dividing boundary made from soil known as "palo" in vernacular). Deceased Popatbhai was asking them as to why are they digging the dividing boundary and the reply was that they want to do it and what is he going to do ? The three accused persons then dragged deceased Popatbhai to the canal (rain water drain) where accused Nos.2 and 3 caught hold of the deceased and accused No.1 forcefully inflicted a blow of pick axe on head of the deceased. The deceased raised a shout and fell down. Therefore, he (Arvindhbai) and his aunt raised shouts, as a result, all the three assailants went away. While going they intimidated Bhanuben by asking her to take care of her husband and if she creates any problem regarding the divider, she also would be done to death. Hearing their shouts, Dhirubhai Kanabhai and Bachubhai Hadabhai came to the spot and the witness informed them as to how the incident had occurred. They took the deceased in a bullock cart to his house where Hasmukhbhai, Mavji hai, Pragjibhai and Vinubhai Bhagwanbhai were present and were informed about the incident. Thereafter deceased Popatbhai was taken to Civil Hospital, Amreli in a jeep car of one Mansukhbhai. the witness identifies the pick axe as Article No.6.

8.0.1 The witness has been cross-examined at length. The relevant and material aspects of which are that during the cross-examination it has been brought out that he was near the boundary of his field adjacent to the road when he heard the altercation. He denies the suggestion that he could not have seen the incident because of the topography. He says that the canal is 5 to 6 ft. deep where the incident occurred. According to him, the Kedki plants are about 18 inches tall. He denied about existence of babul plantations. He says that on hearing his shouts, witnesses Dhirubhai Kanabhai and Bachubhai Hadabhai came. They arrived there within two to three minutes of departure of the accused assailants. He states in his cross-examination that he had informed Dhirubhai Kanabhai and Bachubhai Hadabhai that Bhikhu Mohan, Mohan Pola and Fulbai Mohan had dragged his uncle into the canal where Mohan Pola and Fulbaiben had caught hold of his uncle and Bhikhu Mohan had forcefully inflicted a blow on head of the deceased

with pick axe. He says that no other information was given by him to the two witnesses. It also emerges from the cross-examination that the canal is about 6 to 7 ft. deep and the divider is about 4 ft. high from the ground level. He denies the suggestion that his say about the accused persons dragging his uncle into the canal is false.

8.1 Witness Bhanuben Popatbhai is examined at Exh.17.

She happens to be the widow of the deceased and was with the deceased at the time of the incident working in the field. She states that on noticing the accused persons digging the divider her husband asked them as to why are they digging the divider, to which, Mohan Pola replied that "We want to dig your divider what are you going to do?" As a result, there was some altercation. Therefore, she went to the spot. Hearing the altercation, Arvind had also arrived. The three accused persons dragged deceased to the canal where accused No.2 and 3 caught hold of the deceased and accused No.1 gave pick axe blow on head of the deceased. Her husband raised a shout and then fell down. Therefore, the witness and her nephew Arvind started raising shouts. At that time, Mohan Pola intimidated her by saying that she should take care of her husband and if she speaks she will also be done to death. She says that on hearing the shouts, Dhirubhai Kanabhai and Bachubhai Hadabhai came. Arvind told them about the incident and Dhirubhai brought out the deceased from the canal. At that time, deceased was bleeding from the injury. They took the deceased firstly to home in a bullock cart and then in jeep car to the Civil Hospital Amreli where he was declared dead. She identifies the clothes of the deceased.

8.1.1 Witness has been cross-examined at length.

Certain material aspect which emerged from the cross-examination are relevant. The witness denies that there is a hedge of Kedki plant on the divider. She also denies about existence of Babul tree on the divider. She says that there are small plants. She denies a suggestion that the canal is about 8 to 10 ft. deep but according to her, it is 6 to 7 ft. deep. She says that at the time of the incident she was on the top of the earthen wall. She denies a suggestion about the earlier fight with the accused persons but she says that there was an altercation. She says that Dhirubhai had singularly brought out the deceased from the canal and laid him in the bullock cart. His clothes were not blood stained. She says that one of her clothes was stained with blood which was washed by her son. She denies a suggestion that she does not know as to who caused injury

to her husband. She also denies a suggestion that when she went to the spot her husband was lying in an injured condition.

9. Thus, from the depositions of the eye witnesses what emerges is that witness Bhanuben was with the deceased all along and she had seen the incident occurring. She was standing on the divider wherefrom she saw the occurrence in the canal. The depth of the canal or height of the divider, therefore, becomes insignificant. If she was standing in the field, probably that may have made a difference because then it would have to be considered whether she could have seen the incident because of the obstruction of height of the divider. No question is put to the witnesses to challenge the factum of accused actually causing injury to the deceased. Differently put, on the actual incident there is no cross-examination. The cross-examination has remained on periphery of the topography and other aspects but has not touched the evidence on actual occurrence. There is no reason to disbelieve witness Bhanuben because she says that she was with her husband since morning and were unloading fertilizer. This aspect emerges from deposition of Arvind also and has remained uncontroverted and unchallenged.

9.1 So far as deposition of witness Arvind is concerned, there is no reason to disbelieve him. We have examined the map to find that between his field and the place of incident, there is only one road with rain water drain on both the sides. It has come in evidence that he was on the boundary of his field which is adjacent to the road. He was, therefore, at a place in his field which is nearest to the field of his uncle where the incident has occurred. A cross country run for an agriculturist young boy of about 18 years of age cannot be considered as difficult or a time consuming affair. On hearing altercation, he could have definitely rushed to the place within moments as he states and he also corroborates the version given by Bhanuben of actual occurrence. Arvind has also not been cross-examined on this aspect nor is his version in this regard challenged by the defence.

9.2 Mr Ravani submitted that the conduct of Bhanuben and Arvind at the time of incident and subsequent thereto is such that it should not inspire confidence. They have acted in a very unnatural way. It is submitted that neither of them tried to intervene in the incident. Here again it has to be remembered that the incident has occurred unexpectedly. Even according to the defence, there was some verbal altercation and immediately the

incident occurred. Arvind was at a distance and by the time he could cover the distance and reach the place, the incident had already occurred. He saw the incident while approaching the place of incident and, therefore, non-intervention by the two eye witnesses need not be so viewed as to make their depositions doubtful.

9.3 What emerges, therefore, is that the prosecution has brought on record a concrete, unimpeachable and natural evidence of witnesses whose presence is also natural and involvement of the accused in the incident is established to the hilt.

10. Now comes the question regarding certain discrepancies and contradictions. It has to be examined whether they are material contradictions and whether the discrepancies and contradictions uproot the evidence of eye witnesses.

10.1 It has been contended that Dhirubhai came to the spot, picked up the deceased and brought him out of the canal singlehandedly. At that time, deceased had sustained injury and was bleeding. If that was so, his clothes would have got stained with blood which has not happened and, therefore, his evidence becomes doubtful and ultimately, the prosecution story also becomes doubtful. In our view, this submission, though attractive at first sight, does not assume much importance. The reason is that it does not affect the evidence of eye witnesses Arvindbhai and Bhanuben in any manner. Secondly, there is no evidence on aspect of how the deceased was lying, in what position he was lifted and put in the cart by witness Dhirubhai. The evidence is that he was bleeding from the injury. Whether it was profuse bleeding or not has not come on record. In any event, whether Dhirubhai had come or not or whether he had lifted the deceased and put him on the bullock cart or not are factors independent of the evidence of the eye witnesses and, therefore, even if evidence of Dhirubhai is considered as doubtful, that would not affect the prosecution case. However, we may hasten to add that, in our view, in absence of any evidence regarding manner in which the deceased was lifted by Dhirubhai, mere lack of blood stain on his clothes would not render the deposition of Dhirubhai doubtful when his arrival to the spot is deposed to by the witnesses and his version in deposition is supported by the two eye witnesses.

10.2 As regards the contention that the complaint Exh.32 cannot be treated as the FIR, according to Mr Ravani, the intimation (Yadi) sent by doctor to the

police ought to be treated as the FIR. The said intimation was produced before the trial Court at mark 9/1. The trial Court, however, came to the conclusion that the complaint is FIR and not the intimation (Yadi). We have perused the intimation. It is addressed by Medical Officer, General Hospital, Amreli to PI, City Police Station, Amreli on May 11, 1992. The contents of the intimation can be translated thus:-

"This is to inform that patient named Shri Popatbhai Devjibhai Khichdiya, aged 40 years of village Sarambhada is brought in dead condition after sustaining injuries in a fight. He is admitted here. This is for information."

Having given a thoughtful consideration to the contention, we are of the view that this intimation by the Medical Officer is so cryptic that it cannot be treated as the FIR of the incident in question. It is silent on question as to where the incident has occurred, at what time it has occurred and who are involved in the incident. The contention, therefore, cannot be accepted.

10.3 It was contended that the medical evidence is inconsistent. The doctor has described the dimensions of the injury as 2 cms. X 12 cms. X 1 cm. to indicate that the injury was 2 cms. in length, 12 cms. in width and 1 cm. in depth. The doctor, however, in his deposition has stated otherwise when he says that the injury was 2 cms. in length, 1 cm. in width and 12 cms. in depth. It was contended that the doctor has changed his version to suit to the requirement of the prosecution case. This argument cannot be accepted for the reason that if the PM notes are perused, the injuries described in column 17 and column 19 indicate that the depth of the injury was 12 cms.. It appears that the doctor has committed an error in manner of writing the dimensions of the injury and such a slip cannot damage the prosecution case which is otherwise established by independent and cogent evidence.

10.3.1 It was also contended that the Doctor has not examined the wound with the help of a magnifying glass and, therefore, he could not have correctly described the injury. It was contended that the Doctor has admitted in cross-examination that there were no foreign bodies in the injury particularly of soil. Mr Ravani submitted that admittedly accused No.1 was digging soil, just before the incident, with the pick axe allegedly used by him. If that was so, there should have been some particles of soil in the injury and, therefore, the

prosecution's case should not be accepted. This argument, in our view, cannot be accepted for the reason that the doctor has stated that he has not examined the wound with magnifying glass or microscope and, therefore, the possibility of the doctor not noticing small particles of soil cannot be ruled out. Differently put, absence of soil particles in the wound cannot be inferred. In any event, this situation is based on hypothesis and cannot wipe out the positive evidence which has come on record through witnesses Bhanuben and Arvindbhai.

10.4 It was contended that as per the say of witnesses Arvindbhai and Bhanuben, on hearing their shouts Dhirubhai and Bachubhai Hadabhai arrived at the spot and were informed about the incident but the prosecution has examined only Dhirubhai and has not examined Bachubhai Hadabhai. Bachubhai Hadabhai happens to be from a different village and from a different community. It was, therefore, contended that the prosecution has not examined independent witness. However, in light of the above discussion, when the evidence of the witnesses is found to be otherwise reliable, non-examination of one of the witnesses who came to the spot after the incident cannot damage the prosecution case.

10.5 It was also contended that according to the eye witnesses the deceased was dragged to the canal but there is total absence of other injuries on person. This absence of other injuries cannot advance the defence case of the presence of the witnesses being doubtful any further because it has come on record that the canal was not so deep. There is no evidence to indicate that the deceased had fallen down and then he was dragged. Probably what is meant by the witnesses is that he was physically taken to the canal and, therefore, absence of other injury need not be viewed to render the prosecution case unbelievable.

11. In view of the above discussion, in our view, there is ample evidence to link up accused No.1 with the fatal injury caused to the deceased.

12. Now comes the question whether accused No.1 has been rightly convicted for causing murder or he ought to have been convicted for offence of culpable homicide not amounting to murder. In this regard, evidence of Arvind and Bhanuben, despite close scrutiny, does not reveal that the altercation lasted for a long time, that there was heated exchange of words or that there was some scuffle or assault by the deceased on the accused which

could have gravely and suddenly provoke accused No.1 so as to result in loss of his self-control and in heat of passion, he inflicted the injury. It is not even his case in his statement under Section 313 of CrPC. It is not even a suggestion to the witnesses in the cross-examination. The evidence is plain enough to indicate that the accused persons were digging the divider. The deceased asked them not to do so. They insisted on doing so and in that within moments, the deceased was taken to the canal and was inflicted injury. There is absolutely no material to infer grave and sudden provocation, loss of self-control or heat of passion. There was no fight either. It is also to be noted that the deceased was not armed with any weapon whereas accused No.1 has used pick axe for inflicting injury. The injury is caused on head. It is caused with such a force that it has gone as deep as 12 cms. in the head fracturing the skull. All these aspects collectively indicate that the case cannot fall within purview of culpable homicide not amounting to murder and in our opinion, therefore, the trial Court has rightly recorded conviction of accused No.1 for murder of deceased Popatbhai. We do not find any substance in Criminal Appeal No.588 of 1994. The appeal, therefore, deserves dismissal.

13. Coming to the appeal of the State, it has to be observed that in opinion of the trial Court, there is no material to indicate that accused Nos.2 and 3 shared any common intention with accused No.1 nor did they have any chance to know or infer that accused No.1 will commit murder of deceased Popatbhai. The incident has occurred unexpectedly. There was no prolonged altercation, no heat generated, no scuffle and no fight. Therefore, accused No.2 or 3 could not have even inferred any intention on part of accused No.1 to commit murder of deceased Popatbhai. They, therefore, cannot be said to have intentionally abetted crime of murder by accused No.1 by holding the deceased. There was a boundary dispute going on between the parties. The possibility of accused No.2 and accused No.3 anticipating some less drastic action and attempting to participate in it cannot be ruled out. The charge of aiding or abetting murder by accused No.1 can not be said to have been proved by prosecution in light of evidence on record. While considering the appeal for acquittal, in our view, the view taken by the learned Additional Sessions Judge is not an impossible one and, therefore, we do not think it proper to interfere with the order. Criminal Appeal No.767 of 1994 also, therefore, must fail.

14. Learned advocate Mr Ravani placed reliance on the following decisions:-

- (i) 1993 (2) GLH 38 A.M. Kunhikoya vs. State of Kerala
- (ii) 1993(2) GLH (UJ) 29 Ravjibhai Galabhai vs. State of Gujarat
- (iii) AIR 1982 SC 126 Kulwant Rai vs. State of Punjab
- (iv) AIR 1983 SC 284 Jawaharlal vs. State of Punjab
- (v) AIR 1998 SC 3115 State of Punjab vs. Gurcharan Singh
- (vi) AIR 1996 SC 3513 Mahesh vs. State of M.P.
- (vii) AIR 1990 SC 2252 Hem Raj vs. State (Delhi Admn.)
- (viii) AIR 1989 SC 1094 Surinder Kumar vs. Union Territory, Chandigarh

The above decisions were cited to support the contention that accused No.1 had inflicted only one blow with an agricultural implement which was in his hand. The incident has occurred suddenly. There was no premeditation and, therefore, he can not be charged or convicted for intention to cause death or to cause fatal injury. There cannot be any dispute about the said principle. The said decisions have been rendered in facts of each of the cases. However, as observed by the Apex Court in Surinder Kumar vs. Union Territory, Chandigarh (supra) for invoking Exception 4 to Section 300 four requirements are required to be satisfied:-

- (i) it was a sudden fight;
- (ii) there was no premeditation;
- (iii) the act was done in a heat of passion, and
- (iv) the assailant had not taken any undue advantage or acted in a cruel manner.

14.1 As is discussed above, the evidence indicates that there is no material to indicate that the act was done in heat of passion because there is nothing to indicate generation of any heat at all. There was no fight at all. No resistance to the act of accused No.1

by the deceased is found. Besides this, the assailant accused No.1 has inflicted a brutal injury on head of the deceased which has penetrated as deep as 12 cms. after fracturing the skull. Therefore, the requirement of assailant having not taken undue advantage or acting in a cruel manner is not satisfied. The decisions, therefore, cannot help the accused No.1 simply because there is only one injury. It cannot be said that the case would fall outside the purview of murder and within the purview of definition of culpable homicide not amounting to murder.

15. No other contention is raised. No other case law is cited.

16. In light of the above discussion, both the appeals must fail and are dismissed.

(A.L. Dave, J)

(Sharad D Dave, J)

zgs/-